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COLONIAL APPEALS TO THE PRIVY COUNCIL. I

THE rise of the king in council to the position of a court of last resort for colonial judicial appeals is a subject of much interest for the student of American constitutional law.¹ Not only did the Privy Council come to sustain a relation to the colonial courts analogous in a general way to that which the United States Supreme Court bears to the state courts in our present system, but at least three cases appealed to the English tribunal involved the important principle of American jurisprudence which accords to the judiciary the power of declaring invalid an act of a subordinate legislature.

The appellate jurisdiction of the king in council secured important advantages both to the colonist and to the crown. To the colonist, it represented a means of relief from arbitrary proceedings of colonial courts, which were sometimes swayed by local prejudices rather than controlled by considerations of law and justice. To the crown this appellate control afforded a means of preventing important changes in colonial law without the consent of the mother country; and it also served the purpose of correcting judgments given in the colonial courts to the disadvantage of the crown.²

I

The legal status of appeals from the American colonies was fixed by three classes of enactments: (1) regulations of the home government affecting appeals, as expressed in orders of the king in council and in commissions and instructions to the colonial governors; (2) colonial charters and grants from the crown; and (3) laws passed by colonial legislatures affecting

¹ This study is confined to appeals from the British colonies that later formed the thirteen original states of the United States.

² According to a representation sent to the Council of Trade in 1715 by the king's orders, the home government believed that the system of appeals "contribute[d] very much towards keeping Governors and Plantation Courts in awe." Colonial Records of North Carolina, II, 161.

appeals. This threefold arrangement does not denote that each set of regulations had its own special and peculiar functions to perform; it signifies rather that, in a fashion characteristic of British colonial administration, three organs were concerned in dealing with conditions that might better have been regulated by one.

The first general regulation of the matter by the crown was the order in council of January 23, 1684, that no appeals should be admitted thereafter from the colonies without "sufficient security . . . to prosecute their appeals effectually and to stand the award of his Majesty in council thereupon."¹ This order specified no definite amount of security; it is evident that the sum was to vary with the importance of the case. The order of 1684 also failed to mention a money value which a case must involve before it was subject to appeal.² But the commission issued to Thomas Dongan as royal governor of New York, on June 10, 1686, named such a minimum amount in the case of New York. It also traced the main lines of all later commissions and instructions to colonial governors in respect to appeal to the crown by announcing four principles or rules of procedure: (1) "The matter in difference" must exceed the value of £300 sterling; (2) the appeal must be made within a fortnight after the decision of the colonial court; (3) security must be given by the appellant to answer such charges as should be awarded in case his appeal should not be sustained; and (4) execution of the decree of the colonial court should not be

¹ Acts of the Privy Council of England, Colonial Series, II, no. 123.

² Three regulations of the king in council, applying however only to individual colonial governments, preceded the general order of 1684. The commission of John Cutt as governor of New Hampshire in 1679 and Cranfield's New Hampshire commission of 1682 had designated £50 as the minimum value in an appealable case; N. H. Provincial Papers, I, 373-382, 433-443. An instruction of 1682 to Lord Culpeper, governor of Virginia, had specified a value of £100; Calendar of State Papers, Colonial Series, America and West Indies, 1681-85, no. 384; Hening's Statutes, III, 550-551. Professor H. L. Osgood notes that the commission of Joseph Dudley as president of the temporary government of Massachusetts, September, 1685, named £300 as the necessary amount; *The American Colonies in the Seventeenth Century*, III, 384. A complete collection of governors' commissions and instructions might perhaps show other instances.

suspended by reason of the appeal to the king in council.¹ This last provision worked an injustice in a number of cases and was modified after the year 1727, as will be noted later. The commission issued to Sir Edmund Andros as governor of New England in May, 1686, and his second commission of April, 1688, repeated these instructions and seemed to point to a definite policy of fixing £300 as the minimum amount for appealable cases.² In 1689, however, a general instruction to the colonial governors forbade them to allow appeals to the king in council unless the estate or matter in question amounted to the value of £500 sterling.³ This instruction was probably meant for the island colonies and other possessions of England which were far wealthier than her American continental colonies, for the £300 rule is specified in a number of accessible commissions and instructions from 1690 down to 1730.⁴ To this rule, however, there were two temporary exceptions. In New Hampshire, appeals were allowed to the king in council from 1692 to 1698 when the amount in dispute exceeded £100 sterling.⁵ In New Jersey, from 1702 to probably 1758, the minimum amount was fixed to exceed £200 sterling.⁶

Differentiation of the general class of appeals into particular

¹ New York Colonial Documents, III, 377-382.

² N. H. Provincial Papers, II, 1-10; N. Y. Colonial Documents, III, 537-542.

³ N. C. Colonial Records, II, 161.

⁴ Commission of Governor Sloughter of New York, January 4, 1690; N. Y. Colonial Documents, III, 623-629. Commission of the royal governor, Lionel Copley, of Maryland, June 27, 1691; Maryland Archives, VIII, 263-271. Commission of Benjamin Fletcher as governor of New York, March 18, 1692, and his commission as governor of Pennsylvania, June 27, 1692; N. Y. Colonial Documents, III, 827-833, 856-860. Commissions of the Earl of Bellomont as governor of New York, June 18, 1697, and as governor of New Hampshire, of the same date; *ibid.* IV, 266-273; N. H. Provincial Papers, II, 305-312. Commission of Governor Joseph Dudley of New Hampshire, April 1, 1702; N. H. Provincial Papers, II, 366-375. Instructions of Governor Hunter of New York, December 27, 1709; N. Y. Colonial Documents, V, 124-143. Instructions of the royal governor, George Burrington, of North Carolina, December 14, 1730; N. C. Colonial Records, III, 90-118.

⁵ N. H. Provincial Papers, II, 57-62, 63-69.

⁶ Instructions to Cornbury, November 16, 1702, in Grants and Concessions of New Jersey, 619-646; and to Morris, April 14, 1738, in N. J. Colonial Documents, VI, 15-51.

classes of cases with varying amounts necessary for the appeal began almost at once. The lack of a complete set of governors' instructions prevents an adequate statement respecting the first class of special causes: "all cases of Fines Imposed for misdemeanors." The first instruction in regard to such cases appeared as early as 1690, but the material accessible would indicate that throughout the period only three provinces were affected, namely, New York, New Jersey and North Carolina. Instructions to the governors of New York in 1690 and 1709 granted permission for appeal to the king in council "in all cases of Fines Imposed for misdemeanors, Providing the Fines so imposed exceed the Value of Two hundred Pounds."¹ In the case of New Jersey, instructions to the governors in 1702, 1738 and 1758 fixed the minimum amount in such cases at £200 sterling.² In North Carolina, instructions to the governors in 1730 and 1754 placed the minimum sum at £100 sterling.³ The object of these regulations was evidently the prevention of extortionate penalties at the hands of the colonial officials; and their purpose, the protection of the subject. An examination of the cases appealed shows that few, if any, cases in this class were appealed.

In 1712 a question arose respecting a class of cases in which this time the home government had a particular interest. A controversy had arisen as a result of the anomalous religious situation then existing in New York. Upon the death of Mr. Urquhart, rector of the parish of Jamaica, Long Island, in 1710, Governor Hunter had inducted into office Mr. Thomas Poyer, a person duly qualified according to the royal instructions. But Poyer was kept out of the parsonage house and glebe by the Presbyterians, who laid claim to the property. Poyer was

unwilling to seek his remedy at Law, being apprehensive that if a Cause of the Church should be Tryed and Judged by Dissenters, he

¹ N. Y. Colonial Documents, III, 685-691; V, 124-143.

² Grants and Concessions, 619-646; N. J. Colonial Documents, VI, 15-51; IX, 40-77.

³ N. C. Colonial Records, III, 90-118; V, 1107-1144.

Would not find Justice, and the Value of said House and Glebe being small, an Appeale would not Lye from the Inferiour to your Majesty's Govr and Council there.

The Society for the Propagation of the Gospel brought this matter to the attention of the Privy Council in a representation and petition, which on July 28, 1712, the Council referred to the Board of Trade for its report. In accordance with the report of the Board of Trade, an order in council was issued on February 6, 1713, that appeals should be admitted to the governor and council, and thence to the Privy Council, in all cases where the clergy were immediately concerned, regardless of the amount of money in question.¹ From the evidence at hand, this exemption from the general rule seems to have been little used, if at all.

Before the close of the seventeenth century, the question arose whether cases involving an infraction of the Acts of Trade could be appealed to the king in council. On May 27, 1697, the Privy Council issued orders for admitting appeals by customs officers to the crown in cases of seizure for illegal trading.² This class of cases came to form a fair proportion of those appealed.

In 1727, a practice that had been working much injury to appellants was remedied. Previous to that time, the instructions of the colonial governors had contained a proviso that the execution of the decree of a colonial court should not be suspended by reason of an appeal to the king in council, in any case where a judgment first given by an inferior court was afterwards confirmed by the governor and council. From this regulation, great inconveniences and injustice had resulted,

¹ Acts of the Privy Council, II, no. 1168; N. Y. Colonial Documents, V, 345-346, 352; Documentary History of N. Y., III, 164-165.

² Acts of the Privy Council, II, no. 480. The principle involved is indicated in Attorney-General Northey's opinion in a Nevis case; Chalmers, G., *Opinions of Eminent Lawyers on Various Points of English Jurisprudence*, 531-532; and in a representation of the Committee for Appeals to the Privy Council; Acts of the Privy Council, II, no. 635. When the colonial courts of admiralty were held by virtue of the royal commission, the appeals were reviewed by the Privy Council; if held by authority derived from the admiralty of England, they were adjudicated by the British Court of Admiralty.

because by the time the decision of the king in council was learned in the colonies, the appellee had often become insolvent or had removed himself and his effects from the province. In such a case, when the colonial judgment was reversed and the order in council arrived for making a restitution of estates or goods, it became ineffectual and the appellant was left without redress. The instruction to the governors of February 8, 1727, required them

to Suspend the Execution of any Judgment or Decree, in case of an appeal, till the same be Determined at home, unless good and Sufficient Security be given by the Appellee to make Ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree,

in case it should be reversed.¹ This regulation seems to have removed all cause for complaint on that score thereafter; and it was uniformly embodied in all later instructions to colonial executives.

In the instructions of February 4, 1746, the king in council formulated in a single comprehensive enactment the different practices that had been authorized in previous years, and, profiting by past experiences, introduced a few innovations.² According to these instructions: (1) the appeal must be made within fourteen days after sentence had been declared; (2) "good security" must be given by the appellant that he would effectually prosecute his appeal and would answer the condemnation, as well as pay such costs and damages as might be awarded, should the colonial judgment be affirmed; (3) execution of the sentence of the colonial court must not be suspended, unless the appellee give ample security to cover any possible damages suffered by the appellant in case his appeal should be sustained; and (4) the amount involved in the case must exceed £500. But cases "where the matter in question

¹ Acts of the Privy Council, III, no. 100; N. Y. Colonial Documents, V, 816-817; N. C. Colonial Records, II, 637.

² Burge, W., *Commentaries on Colonial and Foreign Laws*, I, Introduction, xlvii, xlvi. These instructions comprise the best single statement which is to be found in reference to appeals.

relates to the taking or demanding any duty payable to us," *i. e.* the crown, "or to any fee of office, or annual rent, or any such like matter or thing, where the right in future may be bound" were to be subject to appeal although the amount involved were less than £500.¹

Any attempt to summarize, for the entire colonial period, the development of the law regarding the minimum value necessary for appeal, as set forth in the regulations of the king in council, is unsatisfactory, because, as we have seen, the practice varied. The prevailing practice, however, may be stated as follows:

(1) Except in special classes of cases the minimum value requisite for appeal was £300 sterling until 1746; after that date, it was raised to £500 sterling.

(2) In a number of colonies, if not in all, cases involving fines imposed for misdemeanors could be appealed at a much lower amount, usually £200 sterling.

(3) From the second decade of the eighteenth century on, New York cases in which the clergy were immediately concerned could be appealed, regardless of the sum of money in question. Had occasion arisen, this rule would probably have been applied to the other colonies.

(4) After 1746, any cases encroaching upon the crown's prerogative in the matter of the taking of a duty or annual rent or fee of office or the like could be appealed, regardless of the money value involved.

(5) To all regulations requiring a minimum sum for appeal, the Privy Council throughout the eighteenth century upon occasion allowed exceptions. The restraints on appeals were viewed as restraints upon the colonial authorities alone and not upon the king in council. Exceptional cases were brought to

¹ The rules formulated in the general instructions of 1746 were restated in subsequent instructions to single colonial governors. Of these only three sets are to be found in print: those of Governor Dobbs, of North Carolina, in 1754, of Governor Bernard, of New Jersey, in 1758, and of Governor Moore, of New York, in 1765. All these specify the higher minimum of £500, together with the exceptions recited in the general instructions of 1746. N. C. Colonial Records, V, 1107-1144; N. J. Colonial Documents, IX, 40-77; N. Y. Colonial Documents, VII, 764-765. Sir Henry Moore's instructions are given only in part.

the attention of the Privy Council by means of a petition for liberty to appeal, presented by the would-be appellant. An example of such an appeal is to be found in the action of the Privy Council of March 29, 1715, when two cases of Samuel Lillie, of Boston, were admitted for final adjudication, although the amounts involved were in each instance less than £300.¹ The general practice in such cases was stated in the opinion of Attorney-General Northey, in reference to a Jamaica case, December 19, 1717. The attorney-general said that, notwithstanding the fixing of a definite amount necessary for appeal in the instructions to the governor, "it is in his Majesty's power, upon a petition, to allow an appeal in cases of any value where he shall think fit, and such appeals have been often allowed by his Majesty."²

A final word remains to be said concerning the regulations of the Privy Council. On April 14, 1752, instructions were sent to the colonial governors that the various colonies should revise their laws, as Virginia had done in 1748-1749. One of the avowed purposes of this order for the framing of a body of well-digested laws was that the determination of appeals from the colonial courts "depends upon being duly informed of the Laws subsisting there." On this account also, instructions were sent to the chartered colonies, whose laws were not subject to disapproval by the crown, that they should transmit as soon as convenient "a true and Authentic Copy of all their Laws." These directions of the home government were not received with favor by the colonial legislatures; and the Privy Council waived its plan in 1761.³

Until the end of the seventeenth century, the provisions of colonial charters were of importance in the matter of appeals to the Privy Council. Throughout the greater part of that century there were frequent instances in which the authorities in the chartered colonies successfully refused to permit appeals,

¹ Acts of the Privy Council, II, no. 1150. Cf. the Massachusetts case of *Leigh-ton v. Frost* in 1735; *ibid.* III, no. 345.

² Chalmers, G., *Opinions*, 489-491.

³ Acts Privy Council, IV, nos. 167, 210, 444.

basing their denial on provisions, or on the lack of provisions, in the royal grants.¹

An examination of the colonial charters² yields the following results. The grant of Maine to Ferdinando Gorges, in 1639, contained a provision that might be interpreted to refer to the appellate jurisdiction of the crown, but the word "appeal" did not appear. The Carolina charters of 1663 and 1665 contained references in terms almost as general. The grant to the Duke of York, in 1664, of New York, New Jersey and Maine was the first fundamental law that expressly reserved to the king, his heirs and successors the determination of appeals from judgments given in the colonial courts. The same provision was repeated in the grant of 1674 and in the exemplification of this grant by Queen Anne in 1712. The charter of Pennsylvania of 1681 followed very closely the form of statement in the New York grant in regard to appeals. All these patents reserved the determination of appeals to the king, but it cannot be doubted that the king in council was meant. The latest charter to mention the appeals was the charter of Massachusetts Bay of 1691. In this charter, the provisions of which were evidently modeled on the Andros commissions of 1686 and 1688, the king in council was expressly designated as the appellate tribunal, and the usual four rules governing appeals were laid down,³ with the variation that only *personal* actions were named as being appealable. This clause created much controversy in the eighteenth century, as will be noted later. In the charters of Rhode Island, Connecticut, Maryland and Georgia there was no direct recognition of the appellate jurisdiction of the crown, but there were provisions from which the right of appeal was inferable, namely, that the inhabitants of the colonies and their children should be deemed British subjects and should be entitled to all the liberties and immunities thereof, and that no laws should be made by the colonial legislatures repugnant to the law of the realm.

¹ Cf. *infra*, p. 292.

² Thorpe, F. N., *Federal and State Constitutions* was used.

³ Including the giving of security by the appellee for the privilege of a non-suspension of the colonial judgment; cf. *supra*, pp. 284, 285.

As the eighteenth century approached, the home government assumed and maintained the position that it was a matter of no consequence whether or not the colonial charters contained provisions authorizing appeals. This doctrine was plainly enunciated, in 1701, in the opinion of the law officers of the crown, elicited by the refusal of Connecticut to permit appeals;¹ it received its most vigorous and extreme expression in the famous Privy Council case of *Christian v. Corren*, appealed from the Isle of Man in 1716.² In this case, the counsel for the appellant argued:

The subject cannot be deprived of his right to appeal by any words in the King's grant to that purpose, much less if the grant be silent in that particular. . . . It was the right of the subjects to appeal to the sovereign to redress a wrong done to them in any court of justice; nay, if there had been any express words in the grant to exclude appeals, they had been void; because the subjects had an inherent right, inseparable from them as subjects, to apply to the crown for justice.

Upon the weight of this argument, the Privy Council admitted the appeal in question. The extent to which this doctrine was applied in American cases is shown by the fact that the king in council received and decided a larger number of appeals from Rhode Island, whose charter did not authorize appeals, than from any other colony.

In case of a conflict between a colonial enactment and an order in council, the colonial enactment prevailed; provided always, of course, that it was not disallowed by the home government. Not only was the colonial law theoretically superior in the particular colony, but the colonial legislature could enforce its will through its control of the budget.

The importance of the legislation affecting appeals varied in the different colonies. An examination of statutes of five colonies, Virginia, Connecticut, Massachusetts, New York and Rhode Island, seems to indicate that most of the colonial legislatures

¹ Cf. *infra*, pp. 294-296.

² Macqueen, *Appellate Jurisdiction*, 740, 741, quoting from Peere Williams' Reports, I, 329.

either did not concern themselves with the matter of appeals, thus yielding to the orders in council unobstructed sway, or gave legal sanction to the orders and instructions of the home government, with some slight variations. Additional legislation was sometimes passed, defining for the particular colony what was meant by the term "good security."

Virginia passed no laws concerning appeals until 1710, when an act of the legislature expressly asserted the queen's right of determining appeals "in such cases where the same . . . may be allowable by the order or instruction of her majesty, her heirs or successors . . . ; and that all such appeals, commissions and instructions shall be allowed, held good, valid and available . . ."¹ The legislature of Connecticut did not go so far as to deny or abridge the right of appeal by its enactments, but it refused to clothe it with its legal sanction. Three laws passed in Massachusetts (1692-1697), which sought to restrict the classes of appealable cases, were disallowed by the home government; and thereafter no further attempts were made to regulate appeals.² In any case, the process of appeals in that province was fully legalized and adequately provided for by the charter provisions. In New York, the first law touching appeals was enacted in 1683; the minimum amount involved necessary for appeal was fixed at £100, "anything to the Contrary hereof in any wise notwithstanding."³ This provision was contrary to the commissions of Governor Dongan and Governor Sloughter, of 1686 and 1690, which specified £300, and to the general instructions to the governors of 1689 which designated £500. However, no change was made in the law until 1691, when the appealable amount was raised to £300.⁴ In this later law the provisions of the earlier law as to the security to be furnished by the appellant was retained. In order to carry a case to the king in council, the appellant was required: (1) to pay all costs of the colonial decree, and all debts and damages adjudged against him in any other suits

¹ Hening's Statutes, III, 489, 490.

² Acts and Resolves of Massachusetts, I, 72-76, 144, 145, 283-287, 367-375.

³ Colonial Laws of New York, I, 128, 129.

⁴ *Ibid.* I, 226-231.

within the province; (2) to give "in two sufficient sureties by Recognizance" double the value of the debt or matter involved in the colonial court; and (3) to prosecute the appeal with effect and make return thereof within twelve months, or execution should issue against him or his securities.

Colonial legislation in general shows very little hostility to the *principle* of the appellate jurisdiction of the king in council. But there was a tendency, very slight in most colonies and best expressed in the classic instance of Rhode Island, to shape the process of appeals according to the needs of the particular colony and regardless of the wishes of the home government. Rhode Island was favorably situated to attain this end, because its government was subjected only to the loosest supervision by the home government, and under its charter it was largely empowered to control its own destinies. The governor, probably, did not receive many of the periodical instructions from the British administration regulating appeals, and thus, in a sense, Rhode Island was given a free hand. The colony was continually at odds with its neighbors over questions involving boundary rights and consequently land titles. As a result, the Rhode Island assembly was disposed to make appeals to England as expeditious and as easy as possible, for in this way it might be possible to gain the sanction of the home government for its claims.

Rhode Island legislation in regard to appeals began in 1706, when no minimum value necessary for appeal was designated and the only requirement fixed was the giving of bond by the appellant as an earnest for prosecution.¹ Other evidence indicates that, in practice, a value of £20 was required before a case was considered appealable.² As a result, many cases of "very small moment" were appealed to the king in council, and many persons of little means were compelled to lose their rights through inability to defend them. The Act of 1719, accord-

¹ R. I. Colonial Records, III, 562. For a general discussion of the attitude of Rhode Island, see H. O. Hazletine, "Appeals from Colonial Courts to the King in Council with Especial Reference to Rhode Island," Annual Reports of the American Historical Association, 1894, 299-350.

² R. I. Colonial Records, III, 548.

ingly, placed the minimum amount at £300 current money—a sum that, by the time the next law was passed, was equal to less than £30 sterling.¹ Still finding that appeals were being carried to England in matters of too small value, the legislature in 1746 enacted that £150 sterling should be the limit below which no cases could be appealed.² This new value was equal to £1650 current money. This amount was found still to be too low, and an Act of 1764 increased it to £200 lawful money (*i. e.* gold and silver coins) and declared that suits whose foundation was “a bond conditioned for the payment of money only” should not be subject to appeal regardless of the amount involved.³ A later law of 1771 advanced the minimum value of appealable cases to £300 lawful money.⁴ Meantime various regulations had been passed by the legislature with the object of restricting the number of appeals and standardizing the process. These provisions were summed up in the Act of 1764, which included a few features of an earlier law of 1750.

By the Act of 1764, three of the principles which distinguished the Privy Council enactments were incorporated in the laws of Rhode Island, but with certain marked variations: (1) the minimum value required for appeal was fixed, as noted above, at £200; (2) nothing was said about the fourteen days' limit for making appeals; (3) the appellant was required to give security for prosecution, but in the arbitrary amount of £250 lawful money; and (4) execution of the colonial judgment was to be suspended, unless the appellee gave bond in the sum of £250 to restore to the appellant whatever was lost by him in case the decision of the lower court was reversed.⁵

¹ Public Laws R. I., Digest 1730, 106. This ratio may be inferred from the circumstance that in 1747 Rhode Island received from Parliament £7800 sterling as her share of the colonial outlay for the Louisburg expedition. With this amount, the Rhode Island committee in charge of the matter redeemed £88,725 of bills of credit. It appears, accordingly, that £11 current money was deemed equal to about £1 sterling. R. I. Historical Tracts, no. 8, p. 67.

² Public Laws R. I., Digest 1752, 30.

³ Public Laws R. I., Digest 1767, 10.

⁴ Public Laws R. I., Digest 1772, 38.

⁵ Public Laws R. I., Digest 1767, 10. Supplementary acts of 1768 and 1769 made changes of no importance as regards the present study; *cf.* Public Laws R. I., Digest 1772, 8, 17.

This brief review has shown Rhode Island practically unaffected by the enactments of the home government. While the other colonies prior to 1746 had generally a minimum appealable value of £300, Rhode Island had none at all until 1719, when a £30 value was required; and after 1746 Rhode Island had the successive minimum amounts of £150, £200 and £300, while the other colonies apparently were restricted by a £500 proviso. Moreover, Rhode Island was left until 1764 without a code appeal at all comparable to that under which the other colonies had been acting since the beginning of the century. But attention should again be called to the fact that Rhode Island was not a typical instance.

II

From the fact that colonial legislation, as a rule, betrayed no opposition to the principle of appeal it is not to be inferred that there was no opposition in the colonies to the appellate system. There were, on the contrary, efforts to impede and even to prevent its operation; and, in the case of Massachusetts, there was obstructive legislation. These efforts may conveniently be described under four heads: (1) denial of the right of appeal; (2) hostile colonial legislation; (3) evasion by the colonial authorities; and (4) lax enforcement of the orders in council.

In the seventeenth century, when the home government had not yet begun to assert aggressively its prerogative to hear all appeal cases and the number of litigants seeking to appeal was comparatively small, numerous instances may be found of a denial of appeal successfully maintained by colonial authorities. These denials occurred almost exclusively in the chartered colonies. Thus, in November, 1637, the Massachusetts General Court refused an appeal to the Reverend John Wheelwright, declaring

an appeal did not lie in this case, for the King having given us authority by his grant under the great seal of England to hear and determine all causes without reservation, we are not to admit any such appeal . . . and if an appeal should lie in one case, it might be chal-

lenged in all, and then there would be no use of government amongst us.¹

Throughout her existence as a corporate colony, Massachusetts stubbornly maintained her position of judicial independence.

In proprietary North Carolina, the court declared in some detail its reason for not granting an appeal to an aggrieved party.² First, there was "no law, rule or custom for this court (whose authority, as appears by commission, is as full within this government as that of the King's Bench in Great Britain) to stop execution of their judgment, by appeal here made"; second, "this court cannot by law compel the parties to appear before the king and his council, nor ascertain any time for their so doing"; third, "nor is it certain that the king in council will take cognizance thereof." Even as late as 1720, there may be found in the case of South Carolina a petition from the council and assembly to the king, declaring that no method of appeals existed "for the ease of Your Majesty's subjects to Your Majesty and Council, as is done in the rest of Your Majesty's colonies."³

The real struggle between the home government and the colonies over the appeal of cases to the king in council occurred in the closing years of the seventeenth century. As before, the chartered colonies were most tenacious in their claims to the ultimate decision of causes arising within their boundaries; but suggestions of protest may be found in the royal province of New Hampshire,⁴ and even in the Old Dominion itself, which had been subject to the appellate jurisdiction of the

¹ Osgood, *American Colonies in the Seventeenth Century*, I, 249. For numerous other instances, see *ibid.* I, 285; III, 162, 184, 185, 190, 315, 318, 329, 330, 331, with references. John Leverett, the Massachusetts agent, was reported to have declared in 1661 in London that, before they would admit of appeals, the colonists would deliver New England up to the Spaniard; Maverick to Clarendon, Collections N. Y. Historical Society, Fund Series, 1869, p. 30.

² Hawks, F. L., *History of North Carolina*, II, 209 (date of case is not indicated). Chalmers, G., *Introduction to the History of the Revolt*, I, 301, 302, alludes to other denials in Carolina.

³ Osgood, *op. cit.*, II, 300, 301.

⁴ New Hampshire Provincial Papers, II, 341, 342.

king in council almost from the beginning.¹ The attitude of the chartered colonies is indicated by a letter of the Board of Trade to the Earl of Bellomont of April 29, 1701, which speaks of "this declining to admit Appeals to his Maj'ty in Council" as "a humour that prevails so much in the Proprieties and Charter Colonies."² A representation of the Board of Trade to the king on March 26, 1701,³ declared that "diverse of them [the chartered colonies] have denyed appeals to your Majesty, . . . that benefit enjoyed in the Plantations under your majesties immediate Government." A representation of the Board of Trade of March 1, 1702, again averred that the chartered colonies "had refused . . . to allow appeals."⁴ This position of judicial independence constituted one cause of the movement in progress at that time for the withdrawal of all colonial charters by an act of Parliament.

The case of Connecticut was the most conspicuous instance of the denial of appeals. Her charter made no mention of the appellate jurisdiction of the king in council, and she was not inclined to yield her privilege of settling finally any cases that arose within her limits. This attitude was in harmony with her determined purpose to maintain a politically self-sufficient commonwealth. As early as October, 1684, the Connecticut General Court grudgingly declared that, although they did not find anything in the charter "oblidging, requiring or comanding" them to grant the liberty of an appeal to His Majesty, they would not "in any wise put a barr upon the lawful liberty of the demandents, to impeed their appearance before his Ma^{tie} or any of his courts."⁵ This permission, however, was never acted upon by the parties who petitioned for the privilege. Before the end of the century, Connecticut had assumed a more

¹ Account of the Present State of the Government of Virginia (1696-98), in I Massachusetts Historical Society Collections, V, 139; Chalmers, *Introduction etc.*, I, 164.

² N. H. Provincial Papers, II, 341, 342.

³ N. C. Colonial Records, I, 535-537, 540. This charge was repeated *verbatim* by the Board of Trade on January 10, 1705-06; *ibid.* I, 630-633.

⁴ Palfrey, J. G., *History of New England*, IV, 200.

⁵ Conn. Colonial Records, III, 167.

stiff-necked attitude. In 1698, John and Nicholas Hallam, and Edward Palmes and John Hallam, sought to appeal "two particular cases" to the king in council.¹ Their petitions were refused by the Connecticut court on the grounds that the colony courts were the tribunals of last resort. Thereupon the men petitioned the Privy Council for liberty to appeal; and the order in council of March 9, 1699, declared to the governor and company of Connecticut that any persons, aggrieved by the judgments of the Connecticut courts, should be allowed to appeal to the king in council, adding that it was "the inherent right of His Majesty to receive and determine appeals from all his Majesty's colonys in America; and that they do govern themselves accordingly." The colony, imagining that the crown was taking away her charter rights, still refused to comply, the governor declaring, according to a representation of the Hallams, that before an appeal should be allowed, "they would dispute the point with your Majesty." On October 22, 1699, the governor and company of Connecticut presented their case in a diplomatically-worded letter to the Board of Trade, justifying their pretensions by their remoteness from England and by the provisions of their charter. Sir Henry Ashurst, the Connecticut agent, appeared in behalf of the colonial claims on December 13. The persistence of Connecticut in claiming that appeals to England were illegal under her charter caused the Board of Trade to turn to Attorney-General Trevor and Solicitor-General Hawles for their opinion, both as to the legality of appeals and as to the means of forcing Connecticut to comply with the order of March 9. On May 15, 1701, their very important opinion was rendered to the effect that

though there is no reservation of Appeals to his Majesty in the Charter granted to Connecticut, yet that an Appeal doth lye to H. M. in his Council as a right inherent in the Crown, and in case they refuse to

¹ This account is based upon: *America and West Indies Calendar*, 1699, nos. 119, 120, 160, 161, 270, 290; 1700, nos. 385, 460, 477, 974, 1002, 1012, 1014, 1021; 1701, nos. 166, 442, 480, 533; and Macqueen, *Appellate Jurisdiction*, 805, 806; *Acts of the Privy Council*, II, nos. 733, 734; Palfrey, *New England*, IV, 224; Caulkins, F. M., *History of New London*, 222-227.

allow the Appeal there, we think H. M. may proceed to hear the merits of the cause upon an Appeal made to him in Council, whether that Appeal be allowed or admitted there or not.¹

In accordance with this opinion, an order in council on June 12 admitted John and Nicholas Hallam to appeal, these parties having given the proper security to prosecute their appeal and to abide by his majesty's determinations.

A representation of the Board of Trade to Queen Anne on January 10, 1706, declared that the authorities of Connecticut "have refused to allow appeals to Your Majesty in council, and give great discouragements and vexation to those that demand the same."² Acts of the Connecticut government in 1704 and 1710 indeed acknowledged indirectly the legality of the appellate jurisdiction of the crown but refused to assist its operation.³ So far as the published records of the Privy Council show, the colony consistently refused to permit appeals throughout her history. On the other hand, the Privy Council invariably admitted cases from Connecticut upon petition.

The provisions of the Rhode Island charter were similar to those of the Connecticut instrument; but her views in regard to the desirability of appeals were very different, as has been noted. As early as July, 1685, Edward Randolph charged Rhode Island with denying appeals to the king in council, but his evidence is not unimpeachable.⁴ In February, 1699, Francis Brinley, a merchant of Rhode Island, petitioned the Privy Council for leave to appeal, alleging that he had met with serious obstructions to justice in the local courts.⁵ The account of his case was admittedly vague and unsatisfactory; but the Board of Trade, still in the heat of the controversy with Connecticut, advised the Privy Council to assert its authority. The result was an order in council of April 27, 1699, directed

¹ America and West Indies Calendar, 1701, no. 442.

² R. I. Colonial Records, IV, 12-15.

³ Conn. Colonial Records, IV, 480; V, 161.

⁴ R. I. Colonial Records, III, 175.

⁵ This account of the Brinley case is based upon: America and West Indies Calendar, 1699, nos. 122, 299, 315, 341; Acts of the Privy Council, II, no. 732.

to the governor and company of Rhode Island, which reiterated the declaration of the previous month to Connecticut, that it was "the inherent right of His Majesty to receive and determine appeals from all His Majesty's colonies in America and that they do govern themselves accordingly." Governor Cranstons letter to the Board of Trade in response to the order in council proves beyond question that Brinley's statements in his petition had been false. He was shown to have neglected all the legal requirements for rehearing of his case in the Rhode Island courts, and then Cranston continues:

There was never any appeal desired by Brinley of this Government; neither was there any other person ever denied an appeal to His Majesty. But we believe in the case of small actions like this, which does not exceed £20, it will be a great prejudice to the poor subject to be liable to be appealed against. We beg you to state what value appeals shall be granted upon.¹

However, Rhode Island, notable for her remissness in so many matters, did not succeed easily in clearing herself of the taint of denying appeals. The representation of the Privy Council against the colony on March 26, 1705, repeated the charge; and Governor Dudley, of Massachusetts, and Lord Cornbury, governor of New York, gave similar testimony in letters to the Board of Trade of November 2 and November 26, 1705.² But the Rhode Island officials stoutly denied the charges, saying they had not refused to allow appeals when duly applied for and when the value of the matter in controversy required the same.³ In fact, as the eighteenth century progressed, Rhode Island showed herself very anxious to take advantage of the benefits of the appellate system; and the instances of appeals being denied by the courts of the colony were relatively few.

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[*To be continued.*]

¹ America and West Indies Calendar, 1699, no. 672.

² R. I. Colonial Records, 543, 545.

³ *Ibid.* III, 548.